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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

ROBERT KANE et al., Plaintiffs and Respondents, v. VALLEY SLURRY SEAL COMPANY et al., Defendants and Appellants.	C079558 (Super. Ct. No. CV082483)

After a bench trial on class action and individual wage and hour claims brought under Business and Professions Code section 17200 by Robert Kane, Ahmad Lloyd, Kosol Main, Jose Noe Galan and Javier Higuera Parra against their former employer, Valley Slurry Seal Company (Valley),[1] the trial court found against Valley on some of

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[1] As the trial court explained, "[t]he plaintiffs have sued Valley Slurry Seal Company . . . and Valley Slurry Seal Emultech. However, the trial testimony showed that there is but a single entity, Valley Slurry Seal Company, which does business both under its own name and under the name Valley Slurry Seal Emultech. This decision will refer only to [Valley]."

the claims and entered judgment awarding $91,644.49 in total restitution and interest to the named plaintiffs on their individual claims, $218,277.94 in restitution and interest to the class, and injunctive relief requiring Valley to comply with California prevailing wage laws and meal break requirements. The court also awarded the named plaintiffs $996,232.72 in attorneys' fees under Code of Civil Procedure section 1021.5. On appeal, Valley takes a scattershot approach to challenging the judgment and attorneys' fees award. We begin by noting that the appellant must "[s]tate each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "This is not a mere technical requirement." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) It is designed so that we may be advised of " 'the exact question under consideration, instead of being compelled to extricate it from the mass.' " (*Ibid.*) "Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.) As to the arguments properly presented by Valley, none of them hit their target. Accordingly, we affirm the judgment.

I. BACKGROUND

Valley is a contractor that performs, primarily for public works in California, slurry sealing and micro servicing on roads. On April 8, 2008, Yusuf Lewis initiated this class action complaint against Valley on behalf of himself and other similarly situated current and former employees alleging failure to provide meal and rest periods (Lab. Code, § 226.7), failure to provide accurate wage statements (Lab. Code, § 226), failure to pay final wages in a timely manner (Lab. Code, § 203), and an unfair competition law claim (UCL; Bus. & Prof. Code, § 17200 et seq.). Lewis was ultimately replaced by the named plaintiffs, who added causes of action for: (1) failing to pay prevailing wages (Lab. Code, § 1770 et seq.), (2) recovery on public works payment bonds, and (3) civil penalties for Labor Code violations under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.).

In 2012, the trial court granted the named plaintiffs' motion for class certification on two issues involving the payment of prevailing wages to public works employees. The class was defined as "all persons who are employed or have been employed, and who have worked in execution of a public works project as an hourly employee" for Valley in California since May 26, 2006. Trial was set for March 4, 2013.

On January 24, 2013, the court granted the named plaintiffs leave to file a fourth amended complaint and dropped as moot Valley's pending motions for summary adjudication. The operative complaint was filed on February 13, 2013. It asserts the same causes of action as the third amended complaint but amends one paragraph of the PAGA claim to state specific facts regarding the named plaintiffs' letters to the Labor and Workforce Development Agency, such as when they were sent.

Around this time, the trial date was apparently changed to April 2, 2013. Valley subsequently moved to vacate this trial date on the basis that it had yet to file an answer to the operative complaint or motions for summary adjudication. The plaintiffs opposed the motion to vacate the trial date, and specified they were not seeking to toll the five-year period in which the action needed to be brought to trial. Nonetheless, they explained how, if the court were to consider the issue sua sponte, they had diligently prosecuted their case. The court denied the motion to vacate the trial date.

On March 12, 2013, Valley moved ex parte for an order shortening time to hear its demurrer to the fourth amended complaint, and again sought to vacate the trial date. On March 21, 2013, the court filed an order granting Valley's motion for an order shortening time on its demurer and set the hearing for March 27, 2013. The order also explained that the April 2, 2013, trial date was "re-scheduled on the Court's own motion because no court room is available" until April 29, 2013. The court added that it found, pursuant to Code of Civil Procedure section 583.340, subdivision (c), "that [it] is impracticable to bring the case to trial on 4/2/13, and the period from 4/2/13 to 4/29/13 shall not count towards the five-year limit."

The court overruled Valley's demurrer and Valley filed its answer on April 15, 2013. In the meantime, Valley filed and the court denied another ex parte application to continue the trial date.

On April 26, 2013, Valley moved to dismiss the action for failure to bring it to trial within five years. Valley argued the court abused its discretion in denying its earlier motion to vacate the April 2, 2013, trial date because the pleadings were not yet settled. Valley also contended the trial court abused its discretion by rescheduling the trial date sua sponte and tolling the five-year time limit without permitting Valley to brief the issues, including the plaintiffs' reasonable diligence. Valley argued its motion to dismiss should be granted because it was not permitted sufficient time to file motions for summary judgment or adjudication as to the most recent complaint.

The plaintiffs opposed the motion on the grounds that they diligently proceeded to bring the matter to trial and were ready to proceed on April 2, 2013, but the court continued the trial date on its own motion. They also argued Valley had no absolute right to have motions for summary adjudication heard. The court denied Valley's motion to dismiss on the record.

The action proceeded to a bench trial under Business and Professions Code section 17200 after the plaintiffs dismissed all the other claims before trial. After trial, the court issued a tentative decision and proposed statement of decision finding for Valley on some claims and against it on others. After holding a hearing on each side's objections to its tentative decision, the court requested supplemental briefing "regarding whether the plaintiffs suffered an injury in fact by [Valley]'s practice of claiming credit against the prevailing wage for health payments to the parent corporation that exceed the cost of the health benefit premiums paid by the parent corporation." After this briefing, the trial court entered a revised statement of decision.

With respect to the health benefit credits, the court determined that, under California law, Valley should not have taken credit against its prevailing wage

obligations for funds it paid to its parent company that were not used to purchase health coverage for Valley employees. Further, the court explained, "the plaintiffs have established injury in fact, sufficient to order an accounting, by showing that the credits actually taken on the certified payroll records are insufficient to meet the total hourly wage, when the health benefit credit is reduced to the amount actually paid for the coverage. [¶] The Court also finds that the plaintiffs have established an injury in fact because [Valley] immediately took health benefits credits for new employees, even though those new employees were not immediately eligible for such benefits and did not receive them until weeks after hire." "[T]he remedy for these improper credits is an employee-by-employee, hour-by-hour recalculation of the wages due for all class members." The court ordered Valley to prepare the accounting.

The named plaintiffs' individual allegations under Business and Professions Code section 17200, that Valley failed to provide them with meal and rest periods as required by Labor Code section 226.7, also proceeded to a bench trial. The trial court found in favor of the named plaintiffs on the meal period claim because Valley had a blanket on-duty-meal-period policy when there was a significant number of days in which it was possible for the named plaintiffs to have off-duty meal periods. The court awarded each named plaintiff restitution for this claim. Conversely, the trial court found no violation of Valley's duty to provide the named plaintiffs with a required rest period.

The court found the plaintiffs did not establish their class claim that Valley's practice of computing credits for employer payments on an annualized basis by taking an average or composite number of hours worked (rather than annualizing individually) was illegal. The court also rejected the class claim that Valley could not take credit for its payments to a pension trust. Additionally, the court found Valley prevailed on plaintiff Main's claim that he was improperly classified.

The trial court entered judgment awarding $91,644.49 in total restitution and interest to the named plaintiffs on their individual claims, $218,277.94 in restitution and

interest to the class, and injunctive relief requiring Valley to comply with California prevailing wage laws and meal break requirements. The court also awarded the named plaintiffs $996,232.72 in attorneys' fees under Code of Civil Procedure section 1021.5 relating to the successful class claims.

Valley timely appealed.

II. DISCUSSION

A. Motion to Dismiss

Valley raises various challenges to the trial court's denial of Valley's motion to dismiss the action for failure to bring it to trial within five years and the court's decision to toll the five-year period by 27 days. Each of these challenges is unpersuasive.

"An action shall be brought to trial within five years after the action is commenced against the defendant." (Code Civ. Proc., § 583.310.) An action that is not brought within this time must be dismissed. (Code Civ. Proc., § 583.360, subd. (a).) However, as relevant to this proceeding, "[i]n computing the time within which an action must be brought to trial . . . , there shall be excluded the time during which any of the following conditions existed: . . . [¶] . . . [¶] (c) Bringing the action to trial . . . was impossible, impracticable, or futile." (Code Civ. Proc., § 583.340.) Additionally, these exceptions must be liberally construed, consistent with the policy of favoring trial on the merits. (*Gaines v. Fidelity Nat. Title Ins. Co*. (2016) 62 Cal.4th 1081, 1103 (*Gaines*).)

"[T]he trial court must determine what is impossible, impracticable, or futile 'in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' " (*Bruns v. E-Commerce Exchange, Inc*. (2011) 51 Cal.4th 717, 730-731.)

"The question of impossibility, impracticability, or futility is best resolved by the trial court, which 'is in the most advantageous position to evaluate these diverse factual

matters in the first instance.' [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the [Code of Civil Procedure] section 583.340[, subdivision](c) exception. . . . The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the plaintiff has proved that the trial court abused its discretion." (*Bruns v. E-Commerce Exchange, Inc., supra,* 51 Cal.4th at p. 731.) "Under that standard, '[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*Gaines, supra,* 62 Cal.4th at p. 1100.)

1. Trial Court's Inquiry

Valley contends the trial court abused its discretion in finding the impracticability exception applied because it failed to make the necessary fact-intensive inquiry before issuing its March 21, 2013, order rescheduling the trial date and tolling the five-year period. As a threshold matter, Valley's argument does not persuade because apparently no reporter was present for this proceeding. It was Valley's burden, as the appellant, to provide us with a record adequate for review. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) We also presume judgments and orders are correct, and it is up to the appellant to affirmatively show otherwise. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Therefore, we must assume the trial court made any required findings before issuing its order.

Additionally, the March 21, 2013, order was not made in response to a motion to dismiss under Code of Civil Procedure section 583.360. In fact, it pre-dates this motion. The reporter's transcript demonstrates the court did engage in the proper fact-intensive inquiry when it was ultimately called upon to decide Valley's motion to dismiss. The trial court indicated the amendments to the complaint were minor and "more akin to an amendment made during the time of trial." The court explained, "The plaintiffs were, I think, ready for trial on April 2nd. The Court wasn't ready because of court congestion

issues, so we scheduled it for a few weeks later." The court asked Valley's counsel for "the argument that the time from April 2nd until today should count for purposes of a five-year statute when there was nothing plaintiffs could have done about it to avoid that delay. That was something the Court caused."[2] Valley has failed to demonstrate the trial court did not make the proper inquiry.

2. Courtroom Unavailability

Valley erroneously asserts courtroom unavailability is legally insufficient to toll the five-year limit for bringing the action to trial. Valley relies on the following general statement of the law: " 'Time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of these exceptions.' " (*Bruns v. E-Commerce Exchange, Inc., supra,* 51 Cal.4th at p. 731; accord *Gaines, supra,* 62 Cal.4th at p. 1101.) This principle is inapplicable because the named plaintiffs had a place on the court's calendar, but lost it when the court sua sponte continued the trial date due to court congestion. A long line of authority holds that Code of Civil Procedure "section 583.340[,] subdivision (c) tolling includes the aggregate time a case is continued because of courtroom unavailability." (*Chin v. Meier* (1991) 235 Cal.App.3d 1473, 1477; see also *Coe v. City of Los Angeles* (1994) 24 Cal.App.4th 88, 92-93 [tolling five-year period by aggregate period of court-ordered continuances based on courtroom unavailability]; *Rose v. Scott* (1991) 233 Cal.App.3d 537, 542 ["Impossibility occurs when there is no courtroom available"].) Stated differently: "Although the normal time of waiting for a place on the court's calendar is not excluded

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[2] This question from the court does not support Valley's claim that the court impermissibly placed the burden on it to demonstrate time should not be tolled. We will not prohibit a court from asking a party at oral argument for their best argument on a critical issue simply because that party does not bear the burden of proof.

from the 5-year period, where an action has been calendared before the expiration of 5 years, inability to proceed because of court congestion is not chargeable to the period." (6 Wikin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 402, p. 844.) It is true that at least one court has held that we do not merely subtract the time period for court-ordered continuances because of courtroom unavailability without considering whether the plaintiff still could have brought the trial within the five year period with reasonable diligence (see *De Santiago v. D & G Plumbing, Inc*. (2007) 155 Cal.App.4th 365, 376-377), but here the trial court stated that it believed the named plaintiffs were ready for trial and there was nothing they could have done to avoid the delay imposed by the court. We find no error in the trial court's approach.

Valley also relies on a portion of *Gaines* explaining that "when the delay involves the time necessary for the parties to conduct ordinary incidents of proceedings leading up to the trial, the interference must deprive the plaintiff of a ' "substantial portion" of the five-year period for prosecuting the lawsuit' in order to qualify as a circumstance of impracticability." (*Gaines, supra,* 62 Cal.4th at p. 1102.) This principle is also inapplicable. Again, the trial court found that the named plaintiffs were prepared for trial. In *Gaines*, "the delay was occasioned by the parties' agreement to participate in mediation; the need for Aurora to make an appearance and to conduct discovery; and the need for Aurora and Countrywide to file certain defensive pleadings. These are ordinary steps in the prosecution of the action. It was therefore necessary for Gaines to demonstrate that the delay had a significant enough impact on the litigation to elevate it from an ordinary circumstance to a circumstance of impracticability." (*Ibid*.) Here, the impact of the continuance was clear and the fact that it was brief is immaterial to the conclusion that it rendered a timely trial impossible. Under these facts, courtroom unavailability was legally sufficient to toll the five-year limit for bringing this action to trial.

3. Substantial Evidence

Valley argues the trial court's findings of fact were not supported by substantial evidence. In particular, Valley contends it was not courtroom unavailability that made the April 2, 2013, trial date impracticable but rather the fact that it did not file its answer to the operative complaint until April 15, 2013. The trial court, however, made clear that court unavailability was the cause of the altered trial date and not any issue with the pleadings. The named plaintiffs indicated they would have moved to expedite the filing of the answer if the trial had not been moved, and the trial court explained the amendment was akin to an amendment made during the time of trial that would not have interfered with trial readiness. Valley does not address these conclusions on appeal. Substantial evidence supports the trial court's determination that it only moved the trial because of court congestion, and the named plaintiffs were reasonably diligent in prosecuting their case.

4. Allegedly Improper Grounds for Granting Motion

Valley's assertion that the court abused its discretion by denying its motion to dismiss on improper grounds is also without merit. The trial court stated at the hearing, "the bottom line . . . is that . . . given the unhappy choices we are faced with, the choice of dismissing the plaintiff's complaint and depriving them of a day in court is not something the Court is willing to do, and the Court *does find grounds to deny the motion*." (Italics added.) The court's comment that it was deciding between "unhappy choices" is insufficient to demonstrate the court decided the motion to dismiss on improper grounds. We find no error with respect to the court's decision to deny Valley's motion to vacate.

B. Health Benefit Contributions

The UCL prohibits, and provides civil remedies for, unfair competition, which it defines, in relevant part, as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) As we previously explained, at issue at trial were claims

that Valley engaged in unfair competition by violating various provisions of the Labor Code. Of particular importance to this appeal was the claim that Valley committed an unlawful business practice by taking inflated credits against its prevailing wage obligations for the class members' health benefits. "The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc*. (2002) 102 Cal.App.4th 765, 776.) Labor Code section 1771 requires that "workers employed on public works" be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." The prevailing wages are established by the Director of the Department of Industrial Relations. (Lab. Code, §§ 1770, 1773.) Per diem wages include, as relevant here, employer payments for "[h]ealth and welfare" and "[s]ubsistence." (Lab. Code, § 1773.1, subd. (a)(1) & (5).) "Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages." (Lab. Code, § 1773.1, subd. (c).) " 'To calculate the wage, the employer adds the hourly cash wage paid plus the total amount of employer contributions to benefits plans . . . . If this sum falls short of the prevailing wage, then the employer must make up the difference in cash.' " (*Department of Industrial Relations v. Nielsen Construction Co*. (1996) 51 Cal.App.4th 1016, 1020.)

The trial court explained that the issue in this case was whether the requirements of Labor Code section 1773.1, subdivision (b)(1) were met. It provides that employer payments include "[t]he rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program." (Lab. Code, § 1773.1, subd. (b)(1).) Regulations refine this requirement to explain that employer payments include "[t]he rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program *for the benefit of employees, their families and dependents, or retirees*." (Cal. Code of Regs., tit. 8, § 16000, italics added.)

The trial court ultimately found Valley "paid its parent company, Basic Resources, Inc. ([Basic]), and then [Basic] purchased health coverage for [Valley] employees using the funds received from [Valley]. [Basic] determined the amount that [Valley] would pay, and that amount significantly exceeded the amount that [Basic] paid to obtain the health benefits. [Basic] overcharged [Valley] for the health benefits for the purpose of building up a reserve, in case [Basic]/[Valley] decided to self-insure, and as a hedge against future increases in the price of health care. [Valley] took a credit against its prevailing wage obligations for the full amount that it paid [Basic], rather than the lesser amount that [Basic] paid to actually purchase the benefits. [¶] Under California law, [Valley] should not have taken credit for those funds that it paid to [Basic] and that were not used to purchase health coverage for [Valley] employees." (Fn. omitted.) We begin by addressing [Valley]'s final argument relating to this claim—whether it should have been certified as a class action in the first instance.

1. Class Certification

"[O]nly a single element of class suitability, and a single aspect of the trial court's certification decision, is in dispute: whether individual questions or questions of common or general interest predominate. The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Valley contends the trial court erred in granting class certification on the health benefit contribution issue because liability or the fact of damage needed to be demonstrated on an individual basis after judgment on the common issues. We disagree. As a threshold matter, Valley's arguments go primarily to its complaints about the merits of the class claims and, as we will address later in this decision, specifically whether the evidence was sufficient to establish liability. But, "[t]he certification question is

'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) "[R]esolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit." (*Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1023.) A court may, however, " 'consider[ ] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.' " (*Id*. at p. 1024.) Along these lines, "[p]redominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Sav-on Drug Stores, Inc. v. Superior Court, supra,* at p. 334; see also *id.* at p. 333 [" 'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages' "].) "[I]n determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Id.* at p. 327.) The named plaintiffs' theory regarding recovery on this issue was that the credited health benefit contributions were made within the company and not in compliance with California Code of Regulations, title 8, section 16000. This was likely to be amenable to class treatment because it raises identical factual and legal issues as to every member of the class. In support of their motion for class certification, the named plaintiffs submitted evidence regarding the applicable prevailing wage requirements and their actual hourly pay. The named plaintiffs also submitted excerpts of deposition testimony demonstrating the common payroll process regarding calculation of the health benefits. For instance, there was testimony that

classification for prevailing wage purposes is based on acronyms written down by foremen. Based on this evidence, we also find Valley's assertion that class certification was not supported by substantial evidence to be without merit.[3]

Valley contends the named plaintiffs' "conclusory statements that they were not paid the appropriate prevailing wage were admitted into evidence over [Valley]'s objections, including: misstating deposition testimony, lacking sufficient knowledge and foundation to make such conclusions, and being improper lay opinion. [Citations.] It was prejudicial error to admit such evidence." "We need not consider an argument so poorly articulated." (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1307.) "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations.] Hence, conclusory claims of error will fail." (*In re S.C., supra,* 138 Cal.App.4th at p. 408.) Valley cites to its objections to the named plaintiffs declarations and the trial court's order overruling these objections, but not to any support in the record for the assertion that the declarations misstate deposition testimony. Likewise, Valley's argument that the challenged statements lack foundation fails for lack of citation to authority. As to the complaint that the named plaintiffs lacked personal knowledge whether they were paid the prevailing wage or that this constituted improper lay opinion, we note that the named plaintiffs also declared to the hourly pay they received—a matter which appears to be within their personal knowledge. Regardless, where substantial evidence supports the trial court's conclusions, the fact there are boilerplate allegations in the plaintiffs' declarations are not sufficient to reverse class certification. (See *Sav-on*

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[3] Valley's summary of the evidence conspicuously leaves out much of the evidence introduced by the named plaintiffs.

Drug Stores, Inc. v. Superior Court, *supra*, 34 Cal.4th at pp. 333-334 ["Defendant characterizes plaintiffs' declarations generally as conclusory and containing 'boilerplate,' contrasting what it calls '[defendant]'s 52 detailed, fact-specific declarations.' Such observations, however, go to the weight of the evidence, a matter generally entrusted to the trial court's discretion"].) Valley's arguments regarding the admission of this evidence are unavailing.

In opposition to the motion for class certification, Valley argued that individual determinations were required to calculate whether class members were actually paid the prevailing wage. Valley asserted testimony from each employee about the type of work performed was necessary to determine whether the correct classifications were reflected on the time cards. Valley relied on testimony from Lloyd indicating that, on several days, his time card contained no description of the work he performed.[4] Galan testified that he wrote "SQ" on his timecard when he assisted the squeegee person, but he was not a squeegee person himself. Additionally, Valley argues that individual inquiries were required to determine how much credit Valley was entitled to take for its health and welfare contributions and for subsistence payments. Nonetheless, "[a] reasonable court, even allowing for individualized damage determinations, could conclude that . . . a class action would be the most efficient means of resolving class members' . . . claims." (*Sav-on Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 330.) Nothing in the court's class certification order indicated these issues were foreclosed or that any requirement for raising a prevailing wage claim would be effectively nullified. As such, Valley's reliance on *Kight v. CashCall, Inc*. (2014) 231 Cal.App.4th 112 is misplaced. (See *id*. at p. 131 ["[W]e cannot employ class action rules to achieve a public policy

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[4] Kane and Parra testified that they performed additional duties during their employment with Valley other than the ones generally stated in their declarations. Valley's briefing fails to persuade that this has a significant impact on the question of predominance.

objective if the class procedures would eliminate a plaintiff's burden of proving a statutory element and/or interfere with the defendant's right to challenge the plaintiff's evidence"].) The trial court did not abuse its discretion in certifying the health benefit contribution claim as a class action.

2. Whether Valley Took Inflated Health Benefit Credits

Valley contends "[t]he court prejudicially abused its discretion by analyzing the wrong entity and disregarding the overwhelming evidence that [Valley] irrevocably made payments not to [Basic], but to a bona fide trust, the Basic Resources Employee Benefits Trust." Valley posits the health benefit payments were "irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program." (Lab. Code, § 1773.1, subd. (b)(1).) The trial court disagreed. Significantly, the trial court *also* found that the excess payments did not qualify as employer payments under this rule because there was insufficient evidence to show that Basic was holding the excess health benefit payments as a trustee for the benefit of the Valley employees on whose behalf the funds were contributed. (Cal. Code of Regs., tit. 8, § 16000.) As the court explained, "[m]aintaining a reserve to hedge against future health price increases is a prudent business practice, and it may well benefit future employees. But the excess payments were not made for the employees on whose behalf the credit was claimed, and there is no evidence that [Basic] is holding these excess funds as a trustee for them." Valley does not challenge the determination that it failed to demonstrate the payments were being held for the benefit of the class members. For this reason, Valley's argument that it did not take inflated health care benefit credits fails.

3. Injury in Fact

A private person has standing to bring a UCL action only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) Likewise, a private person may only pursue representative claims or relief on behalf of others if they meet these standing requirements. (Bus. &

Prof. Code, § 17203.) Monetary harm is both an "injury in fact" and "lost money." (*Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1347, 1348.) This "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233.) Valley argues that, as a matter of law, the named plaintiffs did not establish standing regarding their health benefit contribution claim because they failed to prove that the credits Valley took for health benefit contributions were required to meet its prevailing wage obligations or that they lost money or property. The trial court reached the opposite conclusion. It found that "for the reasons cited in *Plaintiffs' Supplemental Closing Brief*, the plaintiffs have established an injury in fact, sufficient to order an accounting to determine the extent of the injury. The plaintiffs have shown that, based on the defendant's certified payroll records, if the inflated health credits are removed, it is more likely than not that some of the plaintiffs would not have received the required total hourly wage on some occasions."[5] The court also explained Valley had demonstrated that, "at least in some cases, it *could* have taken other credits that would have ensured that the plaintiffs received the total hourly wage, even if the excess health benefit credit were removed." These claims could defeat plaintiffs' claims for restitution. Nonetheless, the court reiterated that "the plaintiffs have established injury in fact, sufficient to order an accounting, by showing that the credits actually taken on the

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[5] Valley bases much of its argument on the trial court's earlier tentative decision and proposed statement of decision. "This document has no relevance on appeal. [Citation.] We accordingly disregard any argument based thereon." (*People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1341.) Moreover, the court requested supplemental briefing on this issue and apparently benefited therefrom as it reached a different conclusion in its final statement of decision. Thus, it is not appropriate to use the tentative decision even for the limited purpose of interpreting the trial court's findings or conclusions. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268-269.)

certified payroll records are insufficient to meet the total hourly wage, when the health benefit credit is reduced to the amount actually paid for the coverage. [¶] The Court also finds that the plaintiffs have established an injury in fact because [Valley] immediately took health benefits credits for new employees, even though those new employees were not immediately eligible for such benefits and did not receive them until weeks after hire." The trial court clearly stated that the named plaintiffs met their burden of proof to demonstrate that, when corrected, the credits taken on Valley's payroll records were insufficient to meet the total hourly wage at all times. The trial court's uncertainty regarding what an accounting would ultimately demonstrate appears to be based on the lack of sufficient proof to support Valley's claim that taking different credits than it had identified in its payroll records would have been sufficient to meet the prevailing wage. On appeal, Valley makes similar arguments to support its contention that the plaintiffs failed to prove their case. Valley does not address whether the trial court's conclusion that the credits claimed on the payroll records were insufficient was supported by substantial evidence. We conclude it was. Payroll records and testimony at trial demonstrated that, as to at least one plaintiff, the full claimed health benefit was necessary to meet the prevailing wage. Indeed, despite taking an inflated credit for health benefits, Valley still had to pay Parra a cash benefit at times in order to meet the prevailing wage. Accordingly, Valley's claim that the health benefit claim fails for lack of standing is without merit.

4. Accounting

After explaining how, as set forth above, the named plaintiffs established an injury in fact, the trial court determined that "the remedy for these improper credits is an employee-by-employee, hour-by-hour recalculation of the wages due for all class members, with [Valley] receiving health benefit payment credit only for the amount that was *actually* spent to obtain health coverage for the covered employees, and excluding health benefit credits that were taken before the employees received such benefits."

Valley claims the court's decision to order an accounting improperly shifted the burden of proof to Valley and forced Valley to prove the class claims. These arguments are directed at the court's tentative decision, which was superseded by its final statement of decision. Thus, we disregard them. (*People ex rel. State Air Resources Bd. v. Wilmshurst*, *supra*, 68 Cal.App.4th at p. 1341.) And we again reject the assertion that the trial court's final statement of decision did not reflect a finding that the named plaintiffs established an injury in fact. Valley has not demonstrated any error with respect to the trial court's decision to order an accounting.

5. Restitution

Valley argues the court abused its discretion in ordering restitution because: (1) the trial court conflated the concept of damages and restitution; (2) the plaintiffs did not prove a right to restitution; and (3) the trial court did not consider the equities. Here, too, Valley fails to demonstrate any error.

a. The Trial Court Awarded Restitution

"A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173 (*Cortez*).) Labor Code section 17203 provides that "[t]he court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Under this statute, a court may order restitution, but not damages. (*Cortez, supra,* at p. 173.) Valley's contention that the trial court conflated the concept of damages and restitution is unavailing. Our Supreme Court has explained that "orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized by section 17203." (*Id.* at p. 177.) This is what the trial court awarded.

Valley argues the court's restitution award was "premised only on the court's finding that health and welfare contributions were not irrevocably contributed [citations], but not on any quantified amount of money Plaintiffs lost because of it." Not so.

b. Right to Restitution

Valley asserts the plaintiffs failed to prove a right to restitution. Valley relies on *Colgan v. Leatherman Tool Group, Inc*. (2006) 135 Cal.App.4th 663 (*Colgan*), which explains "[t]hat the trial court may have discretion as to whether to order restitution as a remedy [citation] does not mean that when it does, it may select an amount unsupported by evidence." (*Id*. at p. 698.) In *Colgan*, the court of appeal found that the trial court erred in granting its restitution award under the False Advertising Law (Bus. & Prof. Code, §§ 17500, 17533.7), the UCL and the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.). (*Colgan, supra,* at pp. 676, 700.) "In ordering restitution, the trial court used [the defendant's] gross receipts . . . and determined that 25 percent of those gross receipts should be the amount of restitution for [the defendant]'s statutory violations and for the plaintiffs' failure 'to receive the full measure of the product the consumer believed he or she was receiving at the time of purchase.' " (*Id*. at p. 696.) The court of appeal held that the trial court's restitution award was not supported by substantial evidence. (*Id*. at p. 700.) In fact, the record contained "*no* evidence concerning the amount of restitution necessary to restore purchasers to the status quo ante." (*Ibid*.) Here, in contrast, the restitution order was based on evidence presented at trial as well as the accounting ordered by the court. Thus, Valley's argument seems to be an indirect attack on the accounting which formed the basis for the trial court's restitution order. However, Valley does not offer an argument that an accounting is improper where the plaintiffs have established an injury or that a restitution award based on such an accounting is improper. Valley's contentions do not persuade.

c. Equities

"[I]n addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations. In deciding whether to grant the remedy or remedies sought by a UCL plaintiff, the court must permit the defendant to offer such considerations. In short, consideration of the equities between the parties is necessary to ensure an equitable result." (*Cortez, supra,* 23 Cal.4th at pp. 180-181.) Valley contends the trial court failed to consider the equities. Valley's appellate briefing, however, does not demonstrate that it raised particular equitable arguments that were not considered by the trial court. Instead, Valley largely reargues its assertion that the trial court should offset its failure to pay the prevailing wage with other times class members were "overpaid." The trial court considered this argument and, implicitly, Valley's assertion that it merely committed a clerical error. Valley has made no affirmative showing of error.

6. Subsistence Credits

As discussed previously, the trial court's final statement of decision gave Valley directions to prepare an accounting. As relevant here, the trial court explained that "[t]he accounting may include offsetting credits, such as for subsistence, that were not originally claimed as credits on the certified payroll records." Testimony at trial had indicated Valley paid employees a subsistence payment for overnight stays and also for travel to and from the job site. Testimony also indicated that at least some of these payments were not required by the applicable prevailing wage determination. The Division of Labor Standards Enforcement (DLSE)'s Public Works Manual states that, "Historically, the amounts required for either travel or subsistence are fixed daily amounts due to workers whenever the terms of a collective bargaining agreement are adopted by the Director as setting forth the prevailing wage rates in a particular locality.

These fixed amounts are not specifically set forth in any of the Director's published wage determinations, but are only noted in footnotes appearing on the wage determinations."[6]

In its accounting, Valley took a credit for supposed extra subsistence payments against its prevailing wage obligations for each pay period. Valley submitted briefing in support of the approval of its accounting. The court ordered Valley to limit these credits to the day for which the subsistence was actually paid. Valley relies on *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662 (*Peabody*) to support taking the credits on a pay period basis. Valley asserts subsistence payments are similar to commission payments in that they are not specifically linked with any work hours or days within a pay period. We disagree. The DLSE's Public Works Manual states otherwise. Moreover, the fact that subsistence payments are not due and payable on a daily basis (see Lab. Code, § 204, subd. (a)) does not mean that they should be calculated on a pay period basis. By comparison, "[u]nder the California minimum wage law, employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation." (*Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872; see also *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 321-324 [rejecting averaging method for assessing minimum wage violation].) The trial court's rejection of the argument that extra subsistence payments can be averaged over the entire pay period was proper under California law.

Valley argues in the alternative that the trial court should have permitted Valley to take its credit for extra subsistence payments on an annualized basis. Valley notes that it raised this argument in a supplemental brief after oral argument regarding the appropriateness of its accounting. Travel and subsistence payments are included as a

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6 The manual is not binding on courts. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 15.)

component of employer payments in "[p]er diem wages." (Lab. Code, § 1773.1, subd. (a)(4)-(5).) As set forth previously, "[e]mployer payments are a credit against the obligation to pay the general prevailing rate of per diem wages." (*Id*., subd. (c).) "The credit for employer payments shall be computed on an *annualized* basis when the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, unless one or more of the following occur: [¶] (1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer. [¶] (2) The higher rate of payments is required by a project labor agreement. [¶] . . . [¶] (4) The director determines that annualization would not serve the purposes of this chapter." (*Id*., subd. (e), italics added.) Valley cites this provision in support of the assertion that annualization is permitted, but has not demonstrated that it actually applies to these facts and, in a particular, to a subsistence payment that was not required by the prevailing wage determination. An appellant has the obligation to demonstrate error. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544, fn. 8; *Denham v. Superior Court*, *supra,* 2 Cal.3d at p. 564*.)* We need not examine undeveloped claims or make arguments for parties. (*Craddock v. Kmart Corp.*, *supra*, 89 Cal.App.4th at p. 1307.) Valley has not demonstrated that the trial court erred by not permitting annualization under Labor Code section 1772.1, subdivision (e).

Having found no merit to Valley's arguments relating to the class health benefit contribution claim, we turn now to its arguments relating to the named plaintiffs' individual meal period claims.

C. Meal Period Claim

Employers are prohibited from requiring employees to work during a meal period mandated by any applicable order of the Industrial Welfare Commission (IWC). (Lab. Code, § 226.7, subd. (b).) "If an employer fails to provide an employee a meal . . . period in accordance with a state law, including, but not limited to, an applicable . . . order of the

[IWC] . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal . . . period is not provided." (*Id*., subd. (c).) Valley asserts, and the respondents do not dispute, that IWC wage order No 16-2001, codified in California Code of Regulations, title 8, section 11160, is the applicable wage order. It applies to on-site employees in the construction, drilling, logging and mining industries. (Cal. Code Regs., tit. 8, § 11160, subd. (1).) Under that order, "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes." (Cal. Code Regs., tit. 8, § 11160, subd. (10)(A).) "Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents the employee from being relieved of all duty and when, by written agreement between the parties, an on-the-job paid meal period is agreed to and complies with Labor Code [section] 512." (Cal. Code Regs., tit. 8, § 11160, subd. (10)(D).)

Valley required each named plaintiff to sign an agreement stating:

"I understand that the nature of my work at Valley Slurry Seal . . . may prevent me, from time to time, from being relieved of all my duties during my 30-minute meal break. As such, I agree to an 'on-duty' meal period whenever the nature of my work prevents me from being relieved of all duties. During an on-duty meal period, when I am not relieved of all my duties so that I may take an uninterrupted meal break, I understand that I will be compensated for this time.

"I understand that if I am provided a 30-minute uninterrupted meal break, this will not be an on-duty meal period and I will not be compensated for this time. I understand that I am required to clock in and clock-out on my time card for uninterrupted meal periods.

"I understand that I may revoke this on-duty meal period agreement at any time by providing Valley Slurry Seal with written notice of revocation."

The trial court explained that an employer may discharge its meal period obligations through an on-duty meal period taken pursuant to a written agreement, but such *agreements* "are permissible only 'when the nature of the work prevents an employee from being relieved of all duty.' " The court found that "the evidence shows that, at times, it was not possible for [Valley] to provide off-duty meal periods to four of the individual plaintiffs, and at other times, depending on the applicable job duties and client requirements, an off-duty meal period was possible." (Fn. omitted.) As to Main, the court found "it was always or almost always possible" for him to be given an off-duty meal period. Further, "[t]he Court has not been provided with sufficient evidence to determine on how many days it was not possible for [Valley] to provide off-duty meal periods to the five individual plaintiffs." Valley raises various challenges to the trial court's conclusions. We reject each of them.

1. The Court Did Not Invalidate the On-Duty Meal Period Agreement

Valley asserts the trial court found that the on-duty meal period agreements signed by the named plaintiffs were invalid. In fact, the court stated, Valley "had a blanket on-duty meal period *agreement* and *policy*, and the Court finds that such a blanket *policy* is not valid unless the duties of the job *always* (not just sometimes) prevent an off-duty meal period. This conclusion follows from the language of the applicable wage order, which, by using the word 'when' rather than 'if,' suggests that the practicality of off-duty meal periods should be assessed on a day-by-day basis. Also, it would be absurd if a blanket on-duty meal period *policy* covering years of work could be justified by just a few days in which it was impractical to offer an off-duty meal period." (Italics added, fn. omitted.) Despite its initial suggestion that on-duty meal period *agreements* are only permissible when the nature of the work prevents an employee from being relieved of all duty, the court only held that the blanket on-duty meal period *policy* was invalid.

Further, as Valley notes, the trial court stated that "the practicality of off-duty meal periods should be assessed on a day-by-day basis." It added in a footnote that "[t]his does not mean that employers must enter new on-duty meal period agreements every day. Presumably employers could enter into blanket agreements, but then only use them on those days when an off-duty meal period is not practical." Valley contends the law permits the signing of a blanket agreement but "the court must determine whether, each time an on-duty meal period was taken, such was due to the nature of the work preventing an off-duty meal period." (See *Abdullah v. U.S. Security Associates, Inc*. (9th Cir. 2013) 731 F.3d 952, 960, fn. 13 [explaining DLSE opinion letter permitted truck drivers to sign a blanket agreement for on-duty meal periods, but each on-duty meal period covered by the agreement must qualify for the "nature of the work" exception, supporting "plaintiffs' argument that it is unlawful for [defendant] to impose a uniform policy of requiring 'on-duty' meal periods"].) Thus, we can locate no reversible error. The court applied the law correctly even if did not initially articulate it clearly.

2. Nature of the Work

Valley claims the trial court's determination that the nature of the work did not always prevent employees from being relieved of all duty is not supported by substantial evidence. " 'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "The nature of the work exception is an affirmative defense, and thus the burden is on the employer to plead and prove facts justifying on-duty meal periods." (*Lubin v. The Wackenhut Corporation* (2016) 5 Cal.App.5th 926, 943.) The court found that "the evidence shows that, at times, it was not possible for [Valley] to provide off-duty meal periods to four of the individual plaintiffs, and at other times, depending on the applicable job duties and client requirements, an off-duty meal

period was possible." (Fn. omitted.) Substantial evidence supports this conclusion. For instance, a superintendent for Valley testified that meal periods did occur, but they were not possible to schedule every day because of differences between projects. Other testimony similarly supported the idea that meal periods were possible, but the feasibility of taking them varied. Accordingly, the trial court explained it was not "provided with sufficient evidence to determine on how many days it was not possible for [Valley] to provide off-duty meal periods to the five individual plaintiffs." Valley's briefing does not address this conclusion. Its challenge to the trial court's findings regarding the nature of the named plaintiffs' work is without merit.

3. Whether Valley Provided a Meal Period

Valley argues alternatively, and contradictorily, that it did provide employees with meal periods.[7] "The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry." (*Brinker Restaurant Corp. v. Superior Court, supra,* 53 Cal.4th at p. 1040.) Additionally, "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." (*Ibid*.) An employer is also liable upon a determination that it has an unlawful on-duty meal break policy. (*Faulkinbury v. Boyd & Associates, Inc*. (2013) 216 Cal.App.4th 220, 235.) "In other words, the employer's liability arises by adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was able to take the required break goes to damages, and

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[7] It is unclear to what extent Valley made this argument in the trial court. The trial court's statement of decision explained, "[t]here are three ways an employer may discharge its meal period obligations, and the option at issue here is an 'on-duty' meal period, taken pursuant to a written agreement between the employer and employee."

'[t]he fact that individual [employees] may have different *damages* does not require denial of the class certification motion.' " (*Ibid*.) Valley relies largely on time cards that restate the language of the wage order rather than state whether the individual could, in practice, take a meal period off duty or not.[8] Kane testified the actual policy was that there was no meal break. Other plaintiffs testified to the effect that a supervisor or foreman instructed them not to take lunch. Under these circumstances, we find no error in the trial court's conclusion that Valley did not provide meal periods but rather relied on a blanket on-duty meal period policy.

D. Attorneys' Fees

The court awarded the named plaintiffs $996,232.72 in attorneys' fees related to their successful class claim. Valley asserts that, as a matter of law, the named plaintiffs are not entitled to attorneys' fees for an unfair competition law claim predicated on wage and hour violations. "The unfair competition law does not provide for attorney fees, and relief is generally limited to injunctive relief and restitution." (*Walker v. Countrywide Home Loans, Inc*. (2002) 98 Cal.App.4th 1158, 1179.) However, "[i]f a plaintiff prevails in an unfair competition law claim, it may seek attorney fees as a private attorney general pursuant to Code of Civil Procedure section 1021.5." (*Ibid*.) This is what the named plaintiffs did.

"[E]ligibility for [Code of Civil Procedure] section 1021.5 attorney fees is established when '(1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons" and

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[8] Whether or not the named plaintiffs were able to eat while working is largely beside the point because they must also be relieved of all duty during a meal period. (See *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th at p. 1035 ["The IWC's wage orders have long made a meal period's duty-free nature its defining characteristic"].)

(3) "the necessity and financial burden of private enforcement are such as to make the award appropriate." ' " (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214; see Code Civ. Proc., § 1021.5.) "The applicant bears the burden of establishing each criterion required for an attorney fee award under [Code of Civil Procedure] section 1021.5." (*Bui v. Nguyen* (2014) 230 Cal.App.4th 1357, 1375, fn. 9 (*Bui*).)

"On appeal, we review the trial court's decision for abuse of discretion. [Citation.] The trial court's determination may not be disturbed on appeal absent a showing that there is no reasonable basis in the record for the award. [Citation.] 'Particularly in a case such as this, fully briefed and argued before the same trial court which heard [the merits], this is not an insignificant point.' [Citation.]

"On appeal, 'we must pay " 'particular attention to the trial court's stated reasons in denying or awarding fees and [see] whether it applied the proper standards of law in reaching its decision.' " ' [Citation.] 'The pertinent question is whether the grounds given by the court for its [grant] of an award are consistent with the substantive law of [Code of Civil Procedure] section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute.' " (*County of Colusa v. California Wildlife Conservation Bd*. (2006) 145 Cal.App.4th 637, 648.)

Valley begins by proffering an argument not based on the statutory requirements set forth in Code of Civil Procedure section 1021.5 but rather the general assertion that because the named plaintiffs had other financial incentives to bring their case and other mechanisms for recovering attorneys' fees, awarding them attorneys' fees under Code of Civil Procedure section 1021.5 would not comport with the "purpose and intent" of the statute. Valley cites no authority holding that even though the requirements of Code of Civil Procedure section 1021.5 were met, a trial court may not award attorneys' fees where the plaintiff could have or originally intended to (but did not) proceed to trial under a different statute that authorizes attorneys' fees. (See *Bell v. Vista Unified School*

Dist. (2000) 82 Cal.App.4th 672, 690 [stating trial court improperly relied alternatively on Code of Civil Procedure section 1021.5, which nevertheless did not apply]; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 638 ["[R]esort to section 1021.5 is unnecessary"]; but see *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 873 [rejecting argument that Code of Civil Procedure section 1021.5 does not apply where the plaintiff has alleged a violation of a statute that itself provides a mechanism for obtaining an attorney fee award].) We will not imply an additional requirement for obtaining attorneys' fees under Code of Civil Procedure section 1021.5. We now turn to Valley's contention that the trial court abused its discretion in determining that the named plaintiffs satisfied the express criteria of this statute.

1. Enforcement of an Important Right Affecting the Public Interest

"[I]n determining the 'importance' of the particular 'vindicated' right, courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 936.) The trial court found that the action enforced an important right affecting the public interest—the full and prompt payment of an employee's earned wages and the prevailing wage requirements. Valley recasts its argument that the class was overpaid to contend that the lawsuit did not result in the enforcement of an important right affecting public interest. Again, this is not persuasive. In awarding restitution, the trial court found that Valley owed the class members additional wages. Moreover, "[p]revailing wage requirements serve the public interest. [Citation.] The court did not abuse its discretion in finding that this litigation vindicated an important right affecting the public interest." (*Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1523.)

2. A Significant Benefit Has Been Conferred on a Large Class of Persons

"The trial court must determine the significance of the benefit and the size of the class receiving that benefit by realistically assessing the gains that have resulted in a particular case." (*Flannery v. California Highway Patrol, supra,* 61 Cal.App.4th at p. 635; see *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at pp. 939-940 ["We believe . . . that the Legislature contemplated that . . . a trial court would determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case"].) " '[I]t has been repeatedly held that an award of attorney fees is not justified under [Code of Civil Procedure] section 1021.5 if the public benefit gained from the law suit . . . and the important public right enforced by the suit . . . are coincidental' to the monetary or other personal gain realized by the party seeking fees." (*DiPirro v. Bondo Corp*. (2007) 153 Cal.App.4th 150, 199.) Valley asserts that "any possible benefit to the public was merely coincidental to the pecuniary benefit sought by Plaintiffs." We disagree. As the trial court explained, "[t]he health benefit claim provided significant restitution and injunctive relief for 366 class members, and this qualifies as a 'large class' for purposes of [Code of Civil Procedure s]ection 1021.5. [Citation.] The Court also finds that the plaintiffs' pursuit of the health benefit claim will benefit a significant number of future Valley Slurry employees, because this lawsuit has caused Valley Slurry to end its practice of taking an inflated prevailing wage credit for health benefits." (Fn. omitted.) The named plaintiffs' personal motivation does not diminish these facts. (See *Estrada v. FedEx Ground Package System, Inc*. (2007) 154 Cal.App.4th 1, 16-17 ["Estrada's personal motivation does not diminish the fact that he pursued this public interest class action not only for himself but on behalf of a class comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers"].) "No more is required to satisfy the 'significant benefit,' 'public interest,' and 'large class of persons' requirements of Code of Civil Procedure section 1021.5." (*Id.* at

p. 17.) We turn next to the question of the necessity and financial burden of private enforcement.

3. The Necessity and Financial Burden of Private Enforcement

"[T]he necessity and financial burden requirement ' "really examines two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." ' " (*Conservatorship of Whitley, supra,* 50 Cal.4th at p. 1214.) We analyze each issue separately.

a. Necessity of Private Enforcement

The first issue "has long been understood to mean simply that public enforcement is not available, or not sufficiently available." (*Conservatorship of Whitley, supra,* 50 Cal.4th at p. 1217.) "In making this determination, one that implicates the court's equitable discretion concerning attorney fees, the court properly considers all circumstances bearing on the question whether private enforcement was necessary." (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 247-248.) Valley argues the plaintiffs failed to set forth sufficient evidence showing public enforcement of their class claims was inadequate. Valley also states, "[t]he court erred in overruling [Valley]'s objections to Plaintiffs' proffered evidence, rejecting controlling authority establishing such evidence was insufficient, and relying on speculation and conjecture to support its conclusion that private enforcement was necessary." Valley relies on *Bui, supra,* 230 Cal.App.4th 1357, where the court of appeal held the trial court abused its discretion in awarding attorneys' fees because there was no substantial evidence from which the court could have reasonably concluded that private enforcement was necessary. (*Id*. at p. 1377.) In *Bui,* the plaintiff was awarded damages for injuries arising from negligently performed dental work and obtained an injunction prohibiting the defendant dental technician from identifying herself as a dentist. (*Id*. at p. 1361.) In seeking attorneys' fees, the plaintiff relied on one declaration stating " 'it is *extremely* unlikely that any public entity would have sought or obtained the injunction [that] was obtained in this

case,' " and another stating " 'instances of fraudulent conduct such as was exhibited by Hi-Tech Dental are rarely challenged in court, particularly when the offending conduct is directed towards immigrant communities.' " (*Id.* at p. 1371.) The court of appeal explained that "the declarations contain only conclusory assertions": "Neither declaration offers any support for the court's factual finding that there had been 'various unsuccessful efforts to involve the dental regulatory authorities' or that '[t]here had apparently been prior complaints filed, all of which had resulted in no action being taken or insufficient evidence being adduced to allow action to be taken.' " (*Ibid.*) Here, the named plaintiffs relied on a declaration from their counsel explaining that "public enforcement was simply not available for the class to secure restitution for unpaid wages against [Valley]. [Citation.] Public enforcement was only available as to the plaintiff's [*sic*] PAGA claims and, prior to filing the instant lawsuit, the Plaintiffs sent a letter to the Labor and Workforce Development Agency ('LWDA') detailing the extent of its PAGA claims. The LWDA replied on May 1, 2008[,] that it 'does not intend to investigate the allegations.' " The trial court agreed with Valley's assertion that this declaration was conclusory,[9] but held "there are compelling circumstances indicating that private enforcement was necessary, notwithstanding the plaintiffs' failure to present the health benefit claim to the Labor Commissioner." Unlike in *Bui*, the named plaintiffs' theory was not a lack of interest on the part of the public enforcement agency (*id.* at p. 1369) but a challenge regarding the mechanisms available for public enforcement and an argument that the unlawful credits were only discovered through litigation. The trial court analyzed these arguments thoroughly, offering four circumstances indicating that private enforcement was necessary.

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[9] For this reason, we reject Valley's assertion that "[t]he court erred in overruling [Valley]'s objections to Plaintiffs' proffered evidence, rejecting controlling authority establishing such evidence was insufficient."

First, the trial court explained the Labor Commissioner would only have been able to obtain injunctive relief if Valley "willfully" violated the prevailing wage law. (Lab. Code, § 1194.5.) The trial court and Valley both rely on authority explaining that "willfully" in a similar context " 'means that the employer intentionally failed or refused to perform an act *which was required to be done*.' [Citation.] A good faith belief in a legal defense will preclude a finding of willfulness." (*Armenta v. Osmose, Inc*., *supra*, 135 Cal.App.4th at p. 325.) Valley ignores the second sentence in this quotation, despite its importance to the trial court's conclusion: "The issue of willfulness was not litigated in the present suit, but it seems unlikely that the court would have found a willful violation by Valley Slurry, and thus public enforcement would likely have deprived the plaintiffs of the important remedy of injunctive relief." Unlike Valley, we are not willing to dismiss this legal conclusion as speculation and conjecture.

Second, the trial court determined that a private UCL suit provided, on balance, a better procedural vehicle for the enforcement of the employees' rights. Valley does not challenge the trial court's conclusion that individualized "Berman" hearings under Labor Code section 98 et seq. are inferior to a single UCL action. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746.) Nor does it challenge the court's conclusion that other available options likely would have resulted in a shorter limitations period. The trial court stated that it was "not entirely clear whether the Labor Commissioner could have used the UCL to recover unpaid wages." The court explained the applicable standing requirements,[10] concluding "it therefore seems doubtful that the

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[10] UCL actions may be brought "by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California . . . , or by a person who has suffered injury

Labor Commissioner could have used the UCL in this case. Without the benefit of the UCL, the Labor Commissioner's suit would have been hamstrung by a significantly shorter limitations period." (Fn. Omitted.) Valley does not challenge the trial court's legal analysis on this point, but rather seizes upon the fact it hedged its conclusion by stating it was "doubtful" that the Labor Commissioner could have used the UCL as support for Valley's assertion that the trial court's ruling was not based on the evidence but speculation. Again, we find the trial court's choice of wording is not dispositive. The question before the trial court was a legal one, not a factual one, and it reached its conclusion through reasoned legal analysis rather than pure speculation.

The trial court offered two additional reasons for determining that private enforcement was necessary:

"Third, private enforcement offered the prospect of more expeditious relief. The health benefit claim was only discovered *while* the plaintiffs were prosecuting their meal and rest period allegations, and thus by the time they first became aware of the health benefit claim, the plaintiffs were already in the midst of a privately-enforced lawsuit. By contrast, in the typical case (such as *Bui*), the plaintiff is aware of his or her claim *before* making the decision whether to file a private suit or to seek public enforcement, but here, that bridge had already been crossed.

"The plaintiffs could have delayed adding the health benefit claim to this case, to allow time to present the newly-discovered claim to the Labor Commissioner. [¶] But such delay would not only have reduced the recovery on the health benefit claim, since the limitations period was running, but would also have required the plaintiffs to either separate the meal and rest period claims, with the resultant loss of adjudicative efficiency, or delay the entire suit. It is one thing to ask a plaintiff to present his or her claims to an

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in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

enforcement agency *before* filing suit, as in *Bui*, but quite another to require a plaintiff to backtrack and tender claims discovered *during* private litigation.

"Fourth, the recondite and complex nature of Valley Slurry's violation made public enforcement unlikely. The health benefit claim is not a garden-variety wage claim, but instead was a hidden violation only discovered by diligent review of discovery materials. It raised novel legal issues, and necessitated an inquiry into accounting and corporate matters beyond the scope of the typical wage-and-hour claim."

Valley does not challenge these statements and we reject its broader contention that "the court took it upon itself to set forth reasons to find that private enforcement was necessary," thereby relieving the plaintiffs' burden of making such a showing. Again, we discern no reversible error. The court appears to have addressed (and elaborated on) the issues raised by the parties. As previously set forth, "[o]n appeal, 'we must pay " 'particular attention to the trial court's stated reasons in denying or awarding fees and [see] whether it applied the proper standards of law in reaching its decision.' " ' [Citation.] 'The pertinent question is whether the grounds given by the court for its [grant] of an award are consistent with the substantive law of [Code of Civil Procedure] section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute.' " (*County of Colusa v. California Wildlife Conservation Bd., supra*, 145 Cal.App.4th at p. 648.) Here we answer both questions in the affirmative. Unlike in *Bui*, the trial court did not make any factual conclusions that were unsupported by the evidence. Further, Valley has demonstrated no error in the trial court's legal conclusions. We affirm the trial court's conclusion that private enforcement was necessary.

b. Financial Burden of Private Enforcement

We now turn to the question of " ' "whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." ' " (*Conservatorship*

of Whitley, *supra*, 50 Cal.4th at p. 1214.) This "inquiry addresses the 'financial burden of private enforcement.' In determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' " ' " (*Id.* at p. 1215.)

" 'The trial court must first fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves. . . . Once the court is able to put some kind of number on the gains actually attained it must discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome. . . . Thus, if success would yield . . . the litigant group . . . an aggregate of $10,000 but there is only a one-third chance of ultimate victory they won't proceed—as a rational matter—unless their litigation costs are substantially less than $3,000.

" 'After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation—the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition. . . . [¶] The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. . . . [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.' " (*Conservatorship of Whitley*, *supra*, 50 Cal.4th at pp. 1215-1216.) Additionally, in class actions, the court compares "the estimated value of a class action common fund recovery" (not merely each plaintiff's individual stake) to the actual

litigation costs. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1414-1415, overruled on another ground in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151.)

Here, the actual recovery after trial was less than the amount of attorneys' fees awarded but " ' "[w]e do not look at the plaintiff's *actual* recovery after trial, but instead we consider 'the estimated value of the case at the time the vital litigation decisions were being made.' " ' " (*Conservatorship of Whitley, supra,* 50 Cal.4th at p. 1220.) To do so, the trial court relied on an email from plaintiffs' counsel to Valley's counsel that began:

"It was a pleasure speaking with you Friday regarding the possibility of mediating the claims in the [Valley] case. To that end, I informed you that, given the limited class certification ruling, we are looking at this case as a six-figure claim and not a seven-figure claim. Frankly, until we complete our classwide damage discovery, it is unclear to us what the value of the claim would be right now, so it is difficult to give you a formal demand. However, as we see it, if we were to win on the claim because the court or jury determines [Valley] did not comply with California law by 'irrevocably' paying all fringe benefits to a bona fide third party, then we perceive the exposure could be millions of dollars." The trial court noted that "[t]his passage refers to both a 'six-figure claim,' and 'exposure' in the 'millions of dollars.' So which is it—a multi-million dollar case, or one worth less than a million?" (Fn. omitted.) Valley seizes upon a footnote to this question, in which the court stated that "[o]f course, for purposes of this motion, what matters is the expected value of the health benefit claim, which is subsumed in, and therefore less than, the estimated value of the entire case." Valley contends the relevant inquiry is the expected value of the entire case. Even if that were true, it appears that, despite the footnote, that is the value the court actually used. It explained "while the plaintiffs hoped to recover 'millions of dollars,' they were willing to settle the *case* for 'six figure[s].' So the 'exposure' (or hoped-for amount) could be in the 'millions,' but the 'claim' (or demand) was for substantially less. [¶] In making a settlement demand, it is not unusual

for plaintiffs to contrast their demand with the defendant's maximum exposure, to motivate the defendant to seize the offer and avoid the risk of a much larger award. And in this case, given the radical uncertainty about the value of the health benefit claim, it would not be irrational for the plaintiffs to offer a deep discount in their initial settlement demand. Thus, the court finds that the 'six-figure claim' is an indication of the plaintiffs' opening demand." (Italics added.) It appears the health benefit claim drove plaintiffs' counsel's valuation of the case. He did not ascribe any number to any other aspect of the case other than to admit that the value of the other class claims "could be relatively small." Valley argues that if the court applied the proper legal standard, it would have used the valuation from the complaint or the pre-class certification valuation. Valley offers no indication what the former value was. Regardless, "few plaintiffs ever expect to recover the amount they first demand." (*Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at p. 1416.) Similarly, the trial court must " 'discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made.' " (*Conservatorship of Whitley, supra,* 50 Cal.4th at p. 1215.) It was not an abuse of discretion for the trial court to view the six-figure amount as an indication of what counsel reasonably expected to obtain from the litigation at the time vital litigation decisions were made because that was the only figure offered that came close to a settlement demand. The other dollar amounts discussed may have merely been posturing. "[T]hus the estimated value of the case was approximately one million dollars or less. This does not exceed the health benefit litigation costs by a 'substantial margin,' if at all."

We reject Valley's contention that the trial court abused its discretion in determining that the express criteria of Code of Civil Procedure section 1021.5 were satisfied.

III. DISPOSITION

The judgment is affirmed. Robert Kane, Ahmad Lloyd, Kosol Main, Jose Noe Galan and Javier Higuera Parra shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

/S/

HOCH, J.